

FILING AN APPEAL

(Check the Western District's web site at **www.nywd.uscourts.gov** for copies of many of the Court's forms and for other useful information. Go to **www.tourolaw.edu/2ndcircuit/** for Internet access to the Second Circuit Court of Appeals.)

GENERAL INFORMATION

The plaintiff and/or the defendant in a civil case filed in the United States District Court for the Western District of New York may appeal a decision rendered by the District Court to the United States Court of Appeals for the Second Circuit. You must refer to the appeal procedures detailed in the Federal Rules of Appellate Procedure (Fed.R.App.P.) which are set forth in Title 28 of the US Code. If you plan to appeal a decision you should read the Appellate Rules very carefully.

Proper grounds for an appeal often involve allegations that the judge made an error either in his/her interpretation of the law or in a procedural ruling during the course of the trial. For example, a procedural error may exist if the trial judge improperly admitted evidence. However, the fact that an error occurred at the District Court level may not by itself be sufficient to justify reversal of the court's decision. The error must have been sufficiently important so that the judge or jury reached an incorrect decision as a result of the error.

Although there are a few exceptions, usually only final orders or judgments from the District Court may be appealed to the U.S. Circuit Court. (28 U.S.C. § 1291). The exceptions permitting certain specified "interlocutory appeals" are set forth in 28 U.S.C. § 1292.

Appeals courts differ from trial courts in that there are no jurors or witnesses. Testimony is not heard, and the parties themselves may not even be present at the appeal. Usually, a panel of three judges is assigned to hear the appeal of a case. The appellate court will only consider issues the District Court considered. Generally, a party may not submit additional documents to the appellate court that were not part of the record in the District Court. In addition to the record which will be transmitted from the District Court, the appellate court will consider a party's position as set forth in his/her appellate brief. After the appeal is submitted or argued, the panel will usually notify the parties of the decision by mail.

INITIATING YOUR APPEAL

In appeals of right, such as an appeal of a final order or judgment, a party initiates the appeal process by filing a Notice of Appeal with the District Court. Generally, a Notice of Appeal must name the party taking the appeal, describe the judgment or order, or the portion of the judgment or order appealed from, and name the court to which the appeal is taken. Fed.R.App.P. 3. See the attached forms for the Notice of Appeal.

The Notice of Appeal in a civil case must be filed with the Clerk of the District Court within 30 days after the date of entry of the judgment or order from which the appeal is being taken. Fed.R.App.P. 4 (a)(1).¹ The date of entry signifies the entry of the judgment on the district court's docket sheet. (The date an order or opinion is signed is not necessarily the same day that it will be reduced to a judgment or entered on to the court's docket.) It is not advisable to wait until the last moment to file a notice of appeal. Only upon a showing of "excusable neglect" or "good cause" may the District Court use its limited discretion to extend the time for filing a notice of appeal. Fed.R.App.P. 4(a)(5).

If any party files a Notice of Appeal in a case, any other party in the case may file a Notice of Appeal within 14 days of the filing of the first Notice of Appeal or within the 30-day time period from the filing of the order or judgment from which the appeal is taken, whichever is longer. Fed.R.App.P. 4(a)(3).

At present, the filing fee for a Notice of Appeal is \$5.00 and the appellate docket fee is \$450.00, both payable to the Clerk of the District Court. However, pursuant to Fed.R.App.P. 24, a party who has been permitted to proceed in an action in the district court *in forma pauperis* may generally proceed on appeal *in forma pauperis* without further authorization, unless the District Court has certified that the appeal is not taken in good faith, in which case the party must either pay the fee or seek poor person status from the Court of Appeals .

If a party wants to vacate and/or request reconsideration of the judgment or order of the District Court pursuant to a motion filed under Fed. R. Civ. P. 60(b), the time for appeal runs from the entry of the order disposing of such motion, if the 60(b) motion is served within 10 days after the entry of judgment. Fed.R.App.P. 4 (a)(4).

FORM 1: NOTICE OF APPEAL FORM

Use Form 1 as your Notice of Appeal

FORM 2: MOTION FOR EXTENSION OF TIME TO FILE A LATE NOTICE OF APPEAL

Use Form 2 if you failed to file the Notice of Appeal in time. Be sure to attach a completed Form 1 Notice of Appeal to the Form 2 Motion.

FORM 3: COMBINED NOTICE OF APPEAL AND MOTION FOR EXTENSION OF TIME

Use Form 3 if you are mailing the Notice of Appeal and are not sure it will arrive on time. Be sure to attach a completed Form 1 Notice of Appeal to the Form 3 Combined Motion.

¹ If the United States government or an officer or agency of the United States is a party to the action, the notice of appeal may be filed within 60 days after the date of the entry of the judgment or order.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Form 1

_____,

Plaintiff,

v.

NOTICE OF APPEAL

_____,

_____-CV-_____

Defendant(s).

Notice is hereby given that _____ [print your name],
_____ [identify yourself as plaintiff or defendant in the district court action]

in the above-named case, hereby appeals to the United States Court of Appeals for the Second
Circuit from _____ all _____ part [check one] of the decision of this Court entered on
_____, 20____.

[Complete the next section only if you are not appealing the whole order.] I am appealing
from the part of the order which _____

Dated: _____, 20____

Signature

Print Your Name
Appearing Pro Se

Address: _____

Telephone: _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Form 2

_____,

Plaintiff,

v.

**MOTION FOR AN EXTENSION OF TIME
TO FILE A NOTICE OF APPEAL**

_____,

_____-CV-_____

Defendant(s).

Pursuant to Fed.R.App.P. 4(a)(5), _____ [*print your name*], respectfully requests leave to file the attached Notice of Appeal out of time.

_____ [*identify yourself as plaintiff or defendant in the district court action*]

desires to appeal the decision in this action which was entered on _____, 20____, but

failed to file a notice of appeal within the required number of days because : [*Tell the Court what*

the "excusable neglect/good cause" led to your failure to file an appeal within the required number

of days.] _____

Dated: _____, 20____

Signature

Print Your Name
Appearing Pro Se

Address: _____

Telephone: _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Form 3

_____,

Plaintiff,

v.

**MOTION FOR AN EXTENSION OF TIME
TO FILE A NOTICE OF APPEAL**

_____,

_____-CV-_____

Defendant(s).

Notice is hereby given that, in the event the attached Notice of Appeal was not received in the Office of the Clerk of the Court within the required time, _____
[*identify yourself as plaintiff or defendant in the district court action*] respectfully requests the Court to grant an extension of time in accordance with Fed.R.App.P. 4(a)(6). In support of this request, I state under penalty of perjury that this Court's decision was received on _____
[*date*], and that this notice of appeal and motion were mailed to the Court on _____
[*date*].

Dated: _____, 20____

Signature

Print Your Name
Appearing Pro Se

Address:

Telephone:
